

**UNITED STATES DISTRICT COURT
for the
Southern District of Texas**

DOROTHY DENISE HALL

Plaintiff,

v.

**ARKEMIA INC., AND
TEAM INDUSTRIAL SERVICES, INC.,
*Defendants.***

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Civil Action No.: 4-19-cv-002164

**NON-PARTY YESENIA P. BERTL'S OBJECTIONS AND MOTION TO QUASH
DEFENDANT'S SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION
AND NOTICE OF DEPOSITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **YESENIA P. BERTL**, a Non-Party herein, and files her Objections and Motion to Quash Defendant's Subpoena to Testify at Deposition in a Civil Action and Notice of Deposition of Yesenia P. Bertl and would respectfully show the Court as follows:

I.

On or about November 27, 2021, Non-Party **YESENIA P. BERTL** was served with Defendant's Subpoena to Testify at a Deposition in a Civil Action and Notice of Deposition and to produce "records not previously produced in response to the attached authorization for release of records" documents on Monday, December 20, 2021 at 9:00 a.m. at the law offices of Seyfarth Saw, LLP, 700 Milam Street, Ste. 1400, Houston, Texas 77002. Pursuant to the subpoena, Non-Party was specifically requested to produce at the deposition the following: "records not previously produced in response to the attached authorization for release of records". (Please see Defendant's Subpoena To Testify at a Deposition in a Civil Action and Notice of Deposition which are attached hereto as Exhibit "A", and are incorporated by reference for all purposes).

II.

Non-Party **YESENIA P. BERTL** objects to and moves to quash Defendant's Subpoena to Testify at a Deposition in a Civil Action and Notice of Deposition and to produce records not previously produced. Non-Party's Objections and Motion to Quash are timely filed within 14 days of being served. Pursuant to Rule 45(d)(2)(B) of the Federal Rules of Civil Procedure, objections must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. Fed. Civ. Pro. 45(d)(2)(B).

III.

Non-Party objects to testifying in a deposition and producing additional records as this is an undue burden and expense. Non-Party is a licensed professional counselor with an active counseling practice. In order to comply with the subpoena, she would need to cancel her clients, which represents a significant loss of revenue. It is an undue burden and expense for Ms. Bertl to leave her practice without just compensation.

According to Rule 45(d)(3), the court must quash or modify a subpoena that:...(iv) subjects a person to undue burden. *Fed. Civ. Pro. 45(d)(3)*. Further, under rule 45(d)(1), a party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. *Fed. Civ. Pro. 45(d)(1)*. The court must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees on the party or attorney who fails to comply. *Fed. Civ. Pro. 45(d)(1)*.

Non-Party has an informed consent form, wherein Non-Party requests the client agree he/she will not call the therapist to testify. If compelled, Non-Party's fee for court involvement is 5x the hourly rate plus reasonable expenses incurred including travel time, travel fees, written reports and telephone consultations. Ms. Bertl's hourly rate is \$135.00. Thus, for court

involvement, Non-Party's hourly rate is \$675.00. (Please see portion of Informed Consent which is attached hereto as Exhibit "B", and is incorporated by reference for all purposes).

In this case, defense counsel has failed to comply with Federal Rules of Civil Procedure 45(d)(1) and 45(d)(3). Previously, defense counsel requested the records of the Plaintiff pursuant to an authorization. Non-Party complied, produced the records and also complied with defense counsel's request for a business records affidavit. Non-Party then presented her invoice for records to defense counsel on November 19, 2021, to which defense counsel objected. As a result, Non-Party revised her invoice and presented it to defense counsel. The invoice is for \$829.86 which, to date, has not been paid. (Please see email communications and invoice which are attached hereto as Exhibit "C" and incorporated by reference for all purposes).

Defense counsel is aware of Non-Party's fees for court involvement. Yet, defense counsel has not mentioned payment for Non-Party's time to give a deposition or production of additional records. There is no agreement by defense counsel to pay Non-Party's fees associated with giving a deposition or producing any additional records. Moreover, to date, defense counsel has not paid Non-Party's invoice for the records. Defense counsel has not taken any reasonable steps to avoid imposing undue burden and expense on Ms. Bertl.

Thus, given defense counsel's prior handling with obtaining records and current non-payment for the records, it is an even greater undue burden and expense for Non-Party to cancel clients and lose significant revenue to comply with the subpoena and give a deposition and produce records without compensation. Thus, Non-Party objects to and moves to quash Defendant's Subpoena to Testify at Deposition in a Civil Action and Notice of Deposition.

For the foregoing reasons and pursuant to Federal Rules of Civil Procedure 45(d)(1) and 45(d)(3), Non-Party **YESENIA P. BERTL** respectfully requests the Court sustain her Objections and quash Defendant's Subpoena to Testify at Deposition in a Civil Action and Notice of Deposition.

WHEREFORE, PREMISES CONSIDERED, Non-Party **YESENIA P. BERTL**, respectfully requests the Court quash Defendant's Subpoena to Testify at Deposition in a Civil Action and Notice of Deposition of Yesenia P. Bertl, and for such other and further relief to which Non-Party is justly entitled.

Respectfully submitted,

MILLER, SCAMARDI & CARRABBA, P.C.

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**ATTORNEY FOR NON-PARTY,
YESENIA P. BERTL**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been served upon all counsel of record via e-service, e-mail, certified mail, return receipt requested and/or facsimile, pursuant to Rule 5 Fed. R. Civ. Pro., on this 10th day of December, 2021.

/s/ Joanna F. Miller
Joanna F. Miller